

2018

Reclaiming Reclamation: Rule Changes Proposed to Ensure Coal Companies Fund Mandatory Clean-Ups

Taylor Mayhall

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Mayhall, Taylor, "Reclaiming Reclamation: Rule Changes Proposed to Ensure Coal Companies Fund Mandatory Clean-Ups" (2018). *Minnesota Law Review*. 107.

<https://scholarship.law.umn.edu/mlr/107>

Note

Reclaiming Reclamation: Rule Changes Proposed To Ensure Coal Companies Fund Mandatory Clean-Ups

*Taylor Mayhall**

When I was a child my family would travel
Down to Western Kentucky where my parents were born
And there's a backwards old town that's often remembered
So many times that my memories are worn.¹

These nostalgic lyrics by folk singer John Prine may not seem likely candidates to become the anthem of a social activist movement. Yet this 1971 song, entitled "Paradise,"² made famous the large-scale impacts of strip mining, a form of surface mining that removes seams of coal by digging out huge open pits.³

And daddy won't you take me back to Muhlenberg County
Down by the Green River where Paradise⁴ lay
Well, I'm sorry my son, but you're too late in asking
Mister Peabody's coal train has hauled it away⁵

* J.D. Candidate 2018, University of Minnesota Law School. Thank you to everyone who provided ideas and feedback throughout the writing process, especially Professor Bradley Karkkainen, Professor Alexandra Klass, Mr. Gregory Conrad, and *Minnesota Law Review* editors and staff. Copyright © 2018 by Taylor Mayhall.

1. *John Prine Lyrics*, AZLYRICS, <http://www.azlyrics.com/lyrics/johnprine/paradise.html> (last visited Jan. 31, 2018).

2. This song was later covered by numerous prominent artists including Johnny Cash, John Fogerty, and Jimmy Buffett. See *Artists Covering John Prine Songs*, JP SHRINE, <http://www.jpshrine.org/lyrics/prineapps2.htm> (last updated Oct. 4, 2017); see also *Paradise*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Paradise_\(John_Prine_song\)](https://en.wikipedia.org/wiki/Paradise_(John_Prine_song)) (last visited Jan. 31, 2018).

3. William Andrew Hustrulid, *Strip Mining*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/technology/strip-mining> (last visited Jan. 31, 2018).

4. While Paradise figuratively refers to a pristine, heavenly place, it literally refers to a town in Kentucky. See Jack Doyle, *Paradise, 1971: John Prine*, POP HISTORY DIG (May 28, 2014), <http://www.pophistorydig.com/topics/paradise1971-john-prine>.

5. *John Prine Lyrics*, *supra* note 1.

Prine wrote this song for his father, as a tribute to family trips to Kentucky when he was a child.⁶ After the song's debut, environmentalists latched on to it as illustrative of why tougher mining regulations were needed.⁷

Then the coal company came with the world's largest shovel⁸
And they tortured the timber and stripped all the land
Well, they dug for their coal till the land was forsaken
Then they wrote it all down as the progress of man.⁹

By touting this song and pushing hard at Congress and state politicians, environmentalists eventually achieved their goal.¹⁰ Congress passed the Surface Mining Control and Reclamation Act (SMCRA) in 1977,¹¹ with a provision that requires coal mining companies to pay to "reclaim" the areas that have been mined.¹² In other words, Congress makes coal mining companies fund efforts that will someday restore mined areas to a natural state. Until recently, many companies have taken advantage of a provision in the law that allows them to, in effect, insure them-

6. *About*, JOHN PRINE, <http://www.johnprine.com/about> (last visited Jan. 31, 2018).

7. *E.g.*, Doyle, *supra* note 4 ("Prine's song became one of the popular expressions of that struggle [to get strip mine regulations], helping to bring the issue to a broader audience, and was also used to rally supporters."). Environmentalists have continued to use the song as a weapon against Peabody. See Ben Neary, *Peabody Energy Still Chafes at Strip-Mining Protest Song*, WASH. TIMES (July 6, 2015), <http://www.washingtontimes.com/news/2015/jul/6/peabody-energy-still-chafes-at-strip-mining-protes> (describing recent use of the song to rankle Peabody in a federal lawsuit brought by environmentalists regarding a pension-related protest at a Peabody shareholder meeting).

8. For more information about the "world's largest shovel," named Big Hog, see James Bruggers, *Bankrupt Peabody Had "World's Largest Shovel,"* COURIER J. (Apr. 15, 2016), <http://www.courier-journal.com/story/tech/science/watchdog-earth/2016/04/13/peabody-bankruptcy-remembering-big-hog/82980882>.

9. *John Prine Lyrics*, *supra* note 1.

10. See Doyle, *supra* note 4.

11. Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 (2012).

12. See generally, *Regulation of Surface Mining Operations: Hearings on S. 425 and S. 923 Before the S. Comm. on Interior and Insular Affairs*, 93d Cong. (1973) (including testimony before the Senate Committees expressing both opposition to and support for a federal law regulating reclamation of surface mines across the States). In addition to requiring active coal companies to pay for future reclamation, the law also imposes a fee on each ton of coal mined to be deposited into the Abandoned Mine Reclamation Fund, which grants money to reclaim mines abandoned or left inadequately restored prior to SMCRA's passage on August 3, 1977. 30 U.S.C. §§ 1231, 1234.

selves for the reclamation money—a process called self-bonding.¹³

For forty years, coal continued to be the primary fuel for electricity generation in the United States,¹⁴ and top coal mining companies like Peabody, Arch Coal, and Alpha Natural Resources¹⁵ continued to mine and eventually pay to have the land reclaimed.¹⁶ However, beginning in 2015, the industry began to face serious changes. First, natural gas surpassed coal to become the dominant fuel for America's electric grid.¹⁷ Next, Walter Energy, Alpha Natural Resources, and several other major coal companies declared bankruptcy, causing many to wonder who would be next.¹⁸ The pattern of disconcerting industry changes continued in 2016. According to the U.S. Energy Information Administration, coal production declined nationwide by seventeen percent from 2015–2016, falling to the lowest production level

13. Self-bonding is not only permitted in nineteen states, but accounts for a large percentage of outstanding reclamation bonds there. *See infra* note 53.

14. *Natural Gas Expected To Surpass Coal in Mix of Fuel Used for U.S. Power Generation in 2016*, U.S. ENERGY INFO. ADMIN. (Mar. 16, 2016), <http://www.eia.gov/todayinenergy/detail.php?id=25392#> (showing graphically the percentage of U.S. electricity generated from coal since the 1950s).

15. *Major U.S. Coal Producers, 2015*, U.S. ENERGY INFO. ADMIN. (2015), <https://www.eia.gov/coal/annual/pdf/table10.pdf> (showing Peabody ranked number one, Arch Coal at number two, and Alpha Natural Resources at number four).

16. There are three stages of the reclamation process, referred to as Phases I, II, and III. After each phase, the mining company submits evidence of reclamation to the relevant state agency. If the agency determines that reclamation was successful for that phase, the company can apply for release of a portion of its reclamation bond money. Before all the company's reclamation money can be released, Phase III must be successfully completed. That only occurs ten years after final land seeding of an approved native seed mix consistent with the local plant communities. This means that large areas of mined land may get reclaimed, while the company still has not qualified for final bond release. E-mail from Carol Bilbrough, Program Manager, Land Quality Div., Wyo. Dep't of Env'tl. Quality, to author (Feb. 23, 2017) (on file with author). For more information about the reclamation process, see 30 C.F.R. § 800.42 (2017); *see also* OFFICE OF SURFACE MINING, U.S. DEP'T OF INTERIOR, PERMANENT PROGRAM BOND RELEASE GUIDANCE (PHASES I, II, III) (May 8, 2009), https://www.wrcc.osmre.gov/resources/guidanceDocuments/050809Final_BR_Guidance.pdf (providing guidance on the release of reclamation bonds for coal mines).

17. Chris Mooney, *This Huge Change in How We Get Energy Is Coming Much Faster Than Expected*, WASH. POST (Mar. 21, 2016), <https://www.washingtonpost.com/news/energy-environment/wp/2016/03/21/this-huge-change-in-how-we-get-energy-is-coming-much-faster-than-expected>.

18. Jody Xu Klein & Tim Loh, *The Coal Miner "On Everybody's List" as Next Bankruptcy Victim*, BLOOMBERG (Jan. 20, 2016), <http://www.bloomberg.com/news/articles/2016-01-21/the-coal-miner-on-everybody-s-list-as-next-bankruptcy-victim>.

since 1978.¹⁹ Natural gas surpassed coal as the number one source of electricity for the entire year in 2016.²⁰ Then Peabody Coal and Arch Coal, the country's two largest coal producers, declared bankruptcy.²¹

After these bankruptcy announcements, environmentalists, taxpayers, and people living in mine-dependent communities began demanding answers.²² If a mining company has self-bonded—meaning that it has promised to pay for reclamation on the assumption that it would be solvent at the time the cleanup commences—what happens when the company goes bankrupt? In March 2016, one environmental group, WildEarth Guardians, decided to formally address this concern with the federal government by petitioning for a rulemaking to the Office of Surface Mining Reclamation and Enforcement (OSMRE), requesting a change in self-bonding policy under SMCRA.

This Note is about the struggle to hold self-bonded coal companies accountable for reclamation after they have declared bankruptcy, focusing in particular on WildEarth Guardians' March 2016 Petition for Rulemaking. Part I lays out the relevant

19. Brian Park, *Coal Production Declines in 2016, with Average Coal Prices Below Their 2015 Level*, U.S. ENERGY INFO. ADMIN. (Jan. 9, 2017), http://www.eia.gov/todayinenergy/detail.php?id=29472&utm_source=&utm_medium=email&utm_campaign=5623 (“Low natural gas prices, warmer-than-normal temperatures during the 2015[–2016] winter that reduced electricity demand, the retirements of some coal-fired generators, and lower international coal demand have contributed to declining U.S. coal production.”).

20. *Competition Between Coal and Natural Gas Affects Power Markets*, U.S. ENERGY INFO. ADMIN. (June 16, 2017), <https://www.eia.gov/todayinenergy/detail.php?id=31672> (“In 2016, natural gas provided 34% of total electricity generation, surpassing coal to become the leading generation source.”).

21. Clifford Krauss, *Peabody Energy, a Coal Giant, Seeks Bankruptcy Protection*, N.Y. TIMES (Apr. 13, 2016), <https://www.nytimes.com/2016/04/14/business/energy-environment/peabody-energy-coal-chapter-11-bankruptcy-protection.html>; Tracy Rucinski, *Arch Coal Files for Bankruptcy, Hit by Mining Downturn*, REUTERS (Jan. 11, 2016), <http://www.reuters.com/article/us-arch-coal-restructuring-idUSKCN0UP0MR20160111>.

22. In fact, the public began to ask so many questions and environmental groups doggedly filed so many complaints that the Director of the Office of Surface Mining Reclamation and Enforcement (OSMRE) held a conference call with reporters to express his own concerns and doubts. Benjamin Storrow, *Concerned About Self-Bonding, Top Federal Mining Regulator Wonders About Collusion*, CASPER STAR TRIB. (May 18, 2016), http://www.trib.com/business/energy/concerned-about-self-bonding-top-federal-mining-regulator-wonders-about/article_f5f5565a-2a8b-52e9-8d4f-c68d28f76c39.html. Then OSMRE issued its first policy advisory since its establishment in 1977 on the restricted use of self-bonding by states. See Press Release, OSMRE, OSMRE Issues Policy Advisory Regarding Use of Self-Bonding for Coal Mine Reclamation (Aug. 9, 2016), <https://www.osmre.gov/resources/newsroom/news/2016/080916.pdf>.

law, beginning with a description of the policy battle between states and the federal government, and between eastern and western states, that culminated in the passage of SMCRA. SMCRA's self-bonding provision then is explored in detail. Part II contextualizes the Petition for Rulemaking by describing the U.S. coal industry's decline since 2011 and discussing Petitioners' specific requests, as well as the opposing parties' main counterarguments. Finally, Part III looks to the future of self-bonding as a reclamation-funding tool. An examination of possible federal agency, state agency, and legislative actions shows that there is more than one way to approach the problem. Ultimately, this Note argues that a combination of federal rule changes and state agency efforts would provide the best solution to help ensure reclamation efforts occur as planned.

I. DIGGING INTO MINING LEGISLATION: LEGAL CONTEXT OF SELF-BONDING

Coal mining is regulated under the federal Surface Mining Control and Reclamation Act of 1977 (SMCRA).²³ This Part provides an overview of SMCRA's history, along with specific aspects of the law pertaining to self-bonding. This history illustrates the delicate balance struck between federal and state authority that is at stake in the rulemaking petition.

A. HOW CONTENTIOUS COAL MINING LEGISLATION BECAME LAW

Prior to SMCRA's enactment, individual states created their own legislation to regulate coal mining activity.²⁴ Very little was enforced in the way of coal mining reclamation.²⁵ Though surface mining accounts for environmental damage including water pollution, erosion and flooding, air pollution, destruction of fish and wildlife habitats, and noise pollution,²⁶ few states undertook the

23. Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 (2012).

24. John D. Edgcomb, Comment, *Cooperative Federalism and Environmental Protection: The Surface Mining Control and Reclamation Act of 1977*, 58 TUL. L. REV. 299, 305–06 (1983) (discussing the increasing levels of state regulation of surface mining before 1977).

25. *Id.* at 305 (“No state was engaged in enforcing surface mining reclamation until 1939 During the late 1940’s [sic] and early 1950’s [sic] a number of other states passed . . . legislation, but these efforts were usually quite ‘mild’ in nature and normally contained numerous exemptions.”).

26. *Id.* at 303–05. For impacts of surface mining, see generally ALEXIS BONOGOFKY ET AL., NAT’L WILDLIFE FED’N ET AL., UNDERMINED PROMISE II

practice of enforcing reclamation.²⁷ In the late 1960s, conservation groups, believing that the minimal state legislation in existence was not enough to regulate the environmental impacts of mines, began several campaigns to strengthen states' laws on the subject.²⁸ Some states responded by substantially toughening their legislation, and arguments were made by state political figures that the federal government should not get involved at all.²⁹ However, entering the 1970s, Congress came to realize that the mining industry was not policing itself.³⁰ In an effort to create and enforce consistent and meaningful standards, Congress set to work on what would eventually become SMCRA.³¹

Developing legislation that could get through Congress proved extremely difficult. SMCRA's legislative history reveals that the battle involved six years of extensive hearings, bitter debate, and two presidential vetoes before it finally passed.³² "The eighty-eight page bill represents an attempt to 'strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy.'"³³ Ultimately, SMCRA serves several purposes: (1) it acknowledges the nation's interests in protecting the environment; (2) assures the nation's coal supply as a necessary source of energy; and (3) fills a statutory gap to regulate coal mining and reclamation in a way that the other federal environmental statutes in existence at that time—such as the Clean Air Act and the Clean Water Act—did not.³⁴

(2015) [hereinafter UNDERMINED PROMISE II], <http://www.underminedpromise.org/UnderminedPromiseII.pdf> (providing the updated "status of coal surface mine reclamation").

27. "Disproportionate industry influence in state political circles" and the fear of a "regulatory atmosphere" which could drive off potential or existing mine operators" contributed to inadequate state regulatory programs. Edgcomb, *supra* note 24, at 307–08.

28. *Id.* at 306.

29. *Id.*; *see, e.g.*, Surface-Mined Land Conservation and Reclamation Act, 1971 Ill. Laws 2881; KY. REV. STAT. ANN. §§ 350.010–.990 (West 1963); Surface Mining and Reclamation, 1967 W. Va. Acts 909.

30. Edgcomb, *supra* note 24, at 306.

31. *Id.*

32. *Id.* at 311–12.

33. *Id.* (quoting 30 U.S.C. § 1202(f) (Supp. III 1979)).

34. KATIE M. SWEENEY & SHERRIE A. ARMSTRONG, AM. BAR ASS'N: SECTION OF ENV'T, ENERGY, & RES., COOPERATIVE FEDERALISM IN ENVIRONMENTAL LAW: A GROWING ROLE FOR INDUSTRY 4 (Oct. 9, 2013), https://www.americanbar.org/content/dam/aba/events/environment_energy_resources/2013/10/21st_fall_conference/conference_materials/17-sweeney_katie-paper_authcheckdam.pdf.

However, Congress understood that states must play a critical role in mining regulations. While SMCRA created the federal Office of Surface Mining Reclamation and Enforcement (OSMRE) to oversee compliance with the statute,³⁵ Congress also determined that “because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface [coal] mining and reclamation operations . . . should rest with the States.”³⁶ To integrate competing federal and state power, SMCRA established a federal-state partnership scheme. Congress set national minimum standards for surface coal mining operations, and delegated authority to the federal agency OSMRE to interpret those provisions and promulgate procedures for their implementation.³⁷ Then, states had the opportunity to submit their own statutory and regulatory regime for coal mine operations within their jurisdiction, so long as they met the minimum standards in SMCRA.³⁸ If OSMRE determined that a state’s program met the requirements, the state obtained exclusive jurisdiction over surface coal mining and reclamation on nonfederal lands.³⁹ In other words, the federal provisions of SMCRA became irrelevant, and OSMRE retained only limited oversight to ensure that the state’s program is enforced.⁴⁰ This federalism scheme inevitably led to tensions, which will be discussed in Part II. With this background on how SMCRA became law, the next Sections turn to specifics about the requirements and enforcement of SMCRA’s self-bonding provision.

B. HOW SMCRA REQUIRES RECLAMATION BONDS

“The central requirement of SMCRA is that the regulatory authority must approve a permit before any person may operate

35. 30 U.S.C. § 1211 (2012).

36. *Id.* § 1201(f).

37. *Id.* § 1211(c)(1)–(2).

38. *Id.* § 1253.

39. *Id.* Twenty-four states have primacy over mining operations in their jurisdictions. *Self-Bonding Facts*, OSMRE, <http://www.osmre.gov/resources/selfBonding.shtm> (last visited Jan. 31, 2018).

40. SWEENEY & ARMSTRONG, *supra* note 34, at 4–5; *cf.* *Bragg v. W. Va. Coal Ass’n*, 248 F.3d 275, 293–98 (4th Cir. 2001) (holding that a private citizen suit brought in federal court alleging a violation of SMCRA was barred by the Eleventh Amendment because West Virginia had state primacy over its mining program and therefore was not implementing federal law).

a coal mine.”⁴¹ A “precondition to the issuance of a mining permit is the coal mine operator’s demonstration of financial responsibility, satisfied by posting a reclamation bond in an amount ‘sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority.’”⁴² There are three major types of reclamation bonds: corporate surety bonds, collateral bonds, and self-bonds.⁴³ The most important type of reclamation bond for the purposes of this Note is the self-bond.⁴⁴

A self-bond is a legally binding corporate promise, without separate surety or collateral, that is available only to permittees who meet certain financial tests.⁴⁵ The allowance for self-bonds is laid out in SMCRA at 30 U.S.C. § 1259(c): “The regulatory authority may accept the bond of the applicant itself without separate surety when the applicant demonstrates to the satisfaction of the regulatory authority . . . a history of financial solvency and continuous operation sufficient for authorization to self-insure or bond such amount”⁴⁶ This provision was originally proposed in the Senate Committee on Energy and Natural Resources.⁴⁷ The legislative history of the provision states simply, “Subsection (c) recognizes that some applicants can satisfy the objectives of the bond requirement through self-insurance or

41. Maureen D. Carmen & Richard Warne, *SMCRA Enforcement in Bankruptcy: Regulatory Powers Revisited*, 25 ENERGY & MIN. L. INST. ch. 7, 187 (2005). The regulatory authority is either OSMRE or a state agency, if OSMRE has approved the state’s system to obtain “primacy” over coal mining activities within its borders. *Id.*

42. *Id.* at 188 (quoting 30 U.S.C. § 1259(a)).

43. *Reclamation Performance Bonds: Bonding Overview*, OSMRE, <https://www.osmre.gov/resources/bonds/bondsoverview.shtm> (last updated Apr. 24, 2017). A corporate surety bond is a guarantee of a permittee’s performance by an outside surety company, made based on that company’s assessment of the permittee’s credit rating, experience, and net worth. *Id.* The surety company is promising to reclaim a mined site if the permittee fails to do so. *Id.* A collateral bond is a permittee’s sacrifice of some form of collateral (such as cash; certificates of deposit; first-lien interests in real estate; letters of credit; federal, state, or municipal bonds; and investment-grade securities) to be held by the regulatory authority until reclamation is completed. *Id.*

44. This Note will use “self-bond” generally to refer to self-bonds by the mine operator, parent corporate guarantees, and nonparent corporate guarantees unless otherwise specified.

45. *Self-Bonding Facts*, *supra* note 39.

46. 30 U.S.C. § 1259(c). This provision was originally proposed in the Senate Committee on Energy and Natural Resources Amendments to House Bill 2. S. REP. NO. 95-128 (1977).

47. S. REP. NO. 95-128, at 1.

bonding.”⁴⁸ According to the Senate Committee, the purpose of the bond was “having a fund available to accomplish reclamation.”⁴⁹

There are three entities who may qualify to guarantee a self-bond. The same term is often applied to each situation, but the proper terminology is as follows:

A “self-bond” is guaranteed by the mine operator, usually a subsidiary of a larger parent corporation.

A “parent corporate guarantee” is guaranteed by the parent corporation of the mine operator, which is sometimes also a subsidiary of a larger parent corporation. . . .

A “non-parent corporate guarantee” is guaranteed by an entity that is neither the mine operator nor its direct parent [T]he guarantor may be within the same corporate family, or may be non-affiliated.⁵⁰

The main advantage of self-bonds for operators is that they do not tie up property, cash, or credit capacity with regulatory authorities and financial institutions, or require the payment of surety-bond premiums.⁵¹ “SMCRA allows state regulatory authorities to accept self-bonds as a matter of discretion; it does not require them to do so.”⁵² However, nineteen states allow self-bonding, and ten of those states actually have self-bonded surface mining permits issued.⁵³ It may be optional under the statute, but it is a reality on the ground. This means that SMCRA’s

48. *Id.* at 78.

49. *Id.* Interestingly, the Interstate Mining Compact Commission (IMCC), a current opponent of the Petition for Rulemaking, met in Harrisburg, Pennsylvania, in early 1977, to read through the proposed Senate Amendments to House Bill 2 and make suggestions to be shared with Congress. *Surface Mining Control and Reclamation Act of 1977: Hearings on S.7 Before the Subcomm. on Public Lands and Res. of the S. Comm. on Energy and Nat. Res.*, 95th Cong. 174 (1977). The IMCC specifically suggested a “[s]trengthening amendment to disallow ‘self insuring.’” *Id.* at 1190. Its rationale was that “[n]o history of solvency assures future solvency nor does self-bonding make funds readily accessible to the regulatory authority to carry out reclamation plans, but it must litigate with the company to acquire the funds.” *Id.*

50. UNDERMINED PROMISE II, *supra* note 26, at 12.

51. *Id.* at 11–12.

52. OSMRE, Policy Advisory: Self-Bonding 3 (Aug. 5, 2016), <https://www.osmre.gov/resources/bonds/DirPolicyAdvisory-SelfBond.pdf> [hereinafter OSMRE, Policy Advisory].

53. *Self-Bonding Facts*, *supra* note 39. Self-bonding is not just present in those states, but accounts for a huge percentage of those states’ outstanding reclamation bonding. For example, in 2014, self-bonding accounted for seventy percent (\$338,439,944) of outstanding reclamation bonds in New Mexico and sixty-three percent (\$2,138,201,079) in Wyoming. *Self-Bonding Survey*, INTERSTATE MINING COMPACT COMM’N 7–9 (2014), <http://imcc.isa.us/Self%20Bonding%20Survey.pdf>.

self-bonding provision may inadvertently create reclamation-enforcement problems in ten states if the company guaranteeing the self-bond does not have sufficient resources for reclamation when mining is complete. Having identified self-bonds as a prevalent type of reclamation bond, the next Section turns to the federal requirements for a company who wishes to use self-bonds.

C. HOW OSMRE REGULATES SELF-BONDS

Pursuant to its duty to interpret and implement SMCRA's minimum standards for surface coal mining operations, OSMRE has promulgated rules governing self-bonding over the years. The most stringent rules were enacted in 1979, but a petition for rulemaking and several lawsuits initiated by industry and public interest groups led OSMRE to revise the rules in 1983.⁵⁴ These 1983 rules have remained substantially the same to this day, with the inclusion of a 1988 amendment allowing third parties to guarantee a self-bond.⁵⁵ OSMRE's regulations governing self-bonding are listed at 30 C.F.R. § 800.23. They describe the minimum requirements a mining company must demonstrate to qualify for a self-bond.⁵⁶

According to 30 C.F.R. § 800.23(b), a state regulatory authority may accept a self-bond from an applicant for a permit if all of the following conditions are met by the applicant or its parent corporation guarantor: First, "[t]he applicant has been in continuous operation as a business entity for a period of not less than five years."⁵⁷ Second, the applicant must submit financial information in sufficient detail to show that the applicant: (1) "has a current rating for its most recent bond issuance of 'A' or

54. See Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations, 48 Fed. Reg. 32,932 (July 19, 1983). The 1979 rules as originally proposed would have required an applicant for self-bonding to demonstrate compliance with SMCRA over a ten-year period and required that a mortgage or security interest in property at least equal to the bonded liability be granted to the regulatory authority. L. Thomas Galloway & Thomas J. Fitzgerald, *The Bonding Program Under the 1977 Surface Mining Control and Reclamation Act: Chaos in the Coalfields*, 89 W. VA. L. REV. 675, 686 (1987).

55. See Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations Under Regulatory Programs, 53 Fed. Reg. 997 (Jan. 14, 1988).

56. Since federal regulations set the minimum requirements for mining operations, states with approved programs may set more stringent requirements in their own regulations. Carmen & Warne, *supra* note 41, at 187.

57. 30 C.F.R. § 800.23(b)(2) (2017). "Continuous operation" is defined as an entity that conducted business over a period of five years immediately preceding the time of application. *Id.*

higher as issued by either Moody's Investor Service or Standard and Poor's Corporation"; (2) "has a tangible net worth of at least \$10 million, a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater"; or (3) "[t]he applicant's fixed assets in the United States total at least \$20 million, and the applicant has a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater."⁵⁸ Third, the "total amount of the outstanding and proposed self-bonds of the applicant for surface coal mining and reclamation operations must not exceed 25 percent of the applicant's tangible net worth in the United States."⁵⁹ Finally, the last condition is more of a warning: the state regulatory authority may require self-bonded applicants to submit an update of the aforementioned information within ninety days after the close of each fiscal year.⁶⁰

If a permittee intends to use a "parent corporate guarantee," the conditions apply to the parent corporation as if it were the applicant.⁶¹ If a permittee intends to use a "non-parent corporate guarantee," the conditions apply to both the applicant and the corporate guarantor.⁶² While this may seem like a thorough check into the financial history of each applicant and guarantor, the conditions overlook several key factors, particularly related to corporate structuring, that may create reclamation-enforcement problems and recently led to public outcry from environmental groups.

II. BURIED IN DEBT: HOW A MASSIVE DECLINE IN THE COAL INDUSTRY LED TO A PETITION FOR RULEMAKING

The self-bonding provision in SMCRA works well when a mining company is solvent. However, if market demand for coal wanes and mining companies begin to struggle financially, self-bonding becomes a risky way to finance reclamation. Section A describes how such a situation played out over the last eight years, resulting in numerous mining-company bankruptcies and

58. *Id.* § 800.23(b)(3).

59. *Id.* § 800.23(d).

60. *Id.* § 800.23(f).

61. *Id.* § 800.23(c)(1).

62. *Id.* § 800.23(c)(2). Note, however, that the § 800.23(b)(3) financial requirements only apply to the guarantor in the case of a non-parent corporate guarantee, unless the regulatory authority specifically requests the (b)(3) financial information from the applicant. *Id.*

finally WildEarth Guardians' Petition for Rulemaking. Section B explains how problematic assumptions implicit in the self-bonding regulations have been revealed as coal companies enter bankruptcy. Section C identifies petitioners' main concerns and describes the groups who commented in favor of the rulemaking. Finally, Section D looks at the counterarguments made by groups who opposed the rulemaking. Together, these Sections contain the context necessary to meaningfully address the future of self-bonding in the coal industry.

A. BACKGROUND ON RECENT COAL MINING BANKRUPTCIES

Leading up to 2011, coal companies entered large acquisition deals, financed heavily with debt, to capitalize on a temporary rise in coal price.⁶³ Soon after, however, cheap natural gas made available by hydraulic fracking technologies undercut domestic thermal coal markets, and the coal companies began to flounder.⁶⁴ Over a period of eight months from 2015 to early 2016, four of the largest U.S. coal mine operators filed for Chapter 11 protection under the U.S. Bankruptcy Code.⁶⁵ Then in April 2016, Peabody Energy, the world's largest privately-owned coal company, announced that it had filed for Chapter 11 bankruptcy, following a significant downturn in the coal market that left the company saddled with debt.⁶⁶ Peabody's Chapter 11 filing was the latest in a series of coal industry bankruptcies that affected more than fifty companies since 2012; producers accounting for forty-five percent of coal output have filed for bankruptcy in the current industry downturn, according to 2014 U.S. government figures.⁶⁷ In 2017, as coal production costs continue to rise due to economic and geologic factors while global markets and domestic competition for electricity generation push coal

63. UNDERMINED PROMISE II, *supra* note 26, at 13; *see also* Mayur Sontakke, *Should You Expect Big U.S. Coal Mergers and Acquisitions Soon?*, MKT. REALIST (Dec. 3, 2014), <http://www.marketrealist.com/2014/12/understanding-consolidation-us-coal-industry> (describing the acquisition deals in general).

64. *See* Mooney, *supra* note 17 (describing the effect of fracking technologies on coal markets).

65. These companies were Arch Coal, Alpha Natural Resources, Patriot Coal, and Walter Energy. *See* Klein & Loh, *supra* note 18 (describing the companies).

66. Bryan Dewan, *The World's Largest Private Coal Company Just Filed for Bankruptcy*, THINKPROGRESS (Apr. 13, 2016), <https://thinkprogress.org/the-worlds-largest-private-coal-company-just-filed-for-bankruptcy-32946551e2d5>.

67. *Id.*

prices down, the pressures on coal producers show no sign of relenting.⁶⁸ Although President Trump promised to deliver much-needed regulatory and financial support to the coal industry during the 2016 campaign season,⁶⁹ it seems unlikely that the coal market itself will improve in the long term.⁷⁰ Bankruptcy proceedings are the new reality for coal producers, and have recently illuminated some fundamental problems with the practice of self-bonding.

B. ASSUMPTIONS IN SELF-BONDING RULES COME TO LIGHT ONCE BANKRUPTCY OCCURS

When a mining company or its guarantor declares bankruptcy, the full amount of its self-bonds cannot be guaranteed. But, as interpreted by OSMRE and by state regulatory authorities, the regulations set forth at 30 C.F.R. § 800.23 may actually

68. UNDERMINED PROMISE II, *supra* note 26, at 13; *see also* Barack Obama, *The Irreversible Momentum of Clean Energy*, SCIENCE (Jan. 9, 2017), <http://science.sciencemag.org/content/early/2017/01/06/science.aam6284.full> (noting the shift to lower-emitting natural gas). *But see* Elias Johnson, *U.S. Coal Production and Coal-Fired Electricity Generation Expected To Rise in Near Term*, U.S. ENERGY INFO. ADMIN. (Feb. 8, 2017), <https://www.eia.gov/todayinenergy/detail.php?id=29872> (“In 2017 and 2018, as natural gas prices are expected to increase, coal is expected to regain some share of the electricity generation mix, and coal production is expected to increase slightly.”).

69. *See, e.g.*, Donald Trump, *Trump Outlines Plan for American Energy Renaissance*, VOTE SMART (Sept. 22, 2016), <https://votesmart.org/public-statement/1135044/trump-outlines-plan-for-american-energy-renaissance#.WdxEtkyZPGI> (“[Our energy policy] will end the war on coal. I will rescind the coal mining lease moratorium, the excessive Interior Department stream rule, and conduct a top-down review of all anti-coal regulations issued by the Obama Administration.”). *But see* Justin Worland, *Donald Trump Says He’ll Bring Back Coal. Here’s Why He Can’t*, TIME (Nov. 14, 2016), <http://www.time.com/4570070/donald-trump-coal-jobs> (describing why this promise is unlikely to be upheld); Clifford Krauss & Michael Corkery, *A Bleak Outlook for Trump’s Promises to Coal Miners*, N.Y. TIMES (Nov. 19, 2016), <https://www.nytimes.com/2016/11/20/business/energy-environment/a-bleak-outlook-for-trumps-promises-to-coal-miners.html> (describing the challenges the then president-elect would face in order to deliver on his promises).

70. Yet coal companies remained hopeful as coal production increased slightly at the end of 2016. *See* Heather Richards, *Despite Dark Times, Coal Ends 2016 on a More Positive Note*, CASPER STAR TRIB. (Dec. 27, 2016), https://www.trib.com/business/energy/despite-dark-times-coal-ends-on-a-more-positive-note/article_823f6e71-380d-537a-a14e-897c48b53453.html (“In the afterglow of the holiday season, following an increase in coal production at the end of the year, an industry knocked to its knees in 2016 is showing budding optimism.”).

allow companies to self-bond even where they do not have a history of financial solvency.⁷¹ To the extent the rules allow for non-parent corporate guarantees, they do not explicitly require regulatory authorities to account for the financial viability of the non-parent's parent corporation.⁷² For example, OSMRE stated in 2014:

While it may be true that both Peabody Energy Company and Arch Coal, Inc. do not meet the requirements for self-bonding, they are not the guarantors for their mines' self-bonds. There are subsidiary companies in both instances that do meet the requirements for self-bonds, and are the guarantors. This practice is in full compliance with Federal and State laws.⁷³

However, this statement assumes that an insolvent subsidiary is not a reflection of its parent companies. In reality, this has proved to be a false assumption. When Arch Coal filed for bankruptcy on January 11, 2016, the company's subsidiary, Arch Western Resources, also filed for bankruptcy.⁷⁴ When Peabody Energy filed for bankruptcy on April 13, 2016, the company's subsidiary, Peabody Investments Corporation, also filed for bankruptcy.⁷⁵ Put simply, recent coal mining bankruptcies have shown that financial troubles for a larger umbrella company will often impact the subsidiaries under that umbrella too.

In a bankruptcy situation, it is doubtful that a company will agree to produce some other form of reclamation bond, such as surety or collateral, without a great deal of political pressure, since producing another form of bond would make the company's bankruptcy position worse. "[O]btaining a third-party surety bond or posting additional collateral to guarantee reclamation 'if achievable at all, could entail significant expense and directly impact the Debtors' liquidity position.'"⁷⁶ A U.S. Bankruptcy

71. WildEarth Guardians, Petition for the Amendment of a Rule to the Office of Surface Mining Reclamation and Enforcement 1 (Mar. 3, 2016) [hereinafter *Petition for Rulemaking*].

72. *Id.* at 7. The Petition for Rulemaking points out that the rules have been interpreted to not require regulatory authorities to consider the fact that the non-parent corporation's assets may be pledged to a parent corporation's debt, or to consider other factors that may link the financial health of a subsidiary with a parent company. *Id.*

73. *Id.* at 5 (quoting Exhibit 5, OSMRE Self-Bonding Fact Sheet).

74. *Id.* at 6.

75. Peabody Investments Corp., Docket No. 4:16-bk-42549 (Bankr. E.D. Mo. Apr. 13, 2016); *Company Overview of Peabody Investments Corp.*, BLOOMBERG, <http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=29868771> (last visited Jan. 31, 2018).

76. *Petition for Rulemaking*, *supra* note 71, at 6 n.5 (attributing a quotation to Exhibit 5 at 9, but actually quoting Exhibit 6, Notice of the Debtors' Motion

Court allowed at least one company in this situation (Arch Coal) to continue self-bonding for a time despite bankruptcy.⁷⁷ As these bankruptcy proceedings have revealed problematic assumptions implicit within the self-bonding regulations, citizens have become increasingly concerned and pushed for change, demonstrated by the 2016 Petition for Rulemaking.

C. WHAT THE PETITIONERS WANT

On March 3, 2016, WildEarth Guardians, a nonprofit conservation advocacy organization headquartered in New Mexico, filed a petition for rulemaking with OSMRE.⁷⁸ Pursuant to 30 U.S.C. § 1211(g), “any person may petition the [OSMRE] Director to initiate a proceeding for the issuance, amendment, or repeal of a rule under this chapter.”⁷⁹ WildEarth Guardians asked OSMRE to amend self-bonding regulations at 30 C.F.R. § 800.23 to ensure that companies with a history of financial insolvency are not allowed to self-bond coal mining operations.⁸⁰ WildEarth Guardians is specifically concerned about non-parent corporate guarantees, because the current rules do not contemplate that subsidiary corporations may be insolvent by virtue of the insolvency of their parent or ultimate parent corporations.⁸¹ If U.S. Bankruptcy Courts allow bankrupt companies to continue self-bonding—as has been done in the past⁸²—the current rules present a very significant and real risk that some or all of the company’s reclamation obligations will eventually fall upon taxpayers; indeed, as currently applied, the rules do not achieve the objectives and purposes of SMCRA’s bonding requirements.⁸³

1. Proposed Rule Changes

WildEarth Guardians attached redlined suggestions for new

Pursuant to Bankruptcy Rule 9019, for Entry of a Stipulation and Order Concerning Reclamation Bonding of Their Surface Coal Mining Operations in Wyoming at 9, *In re Arch Coal Inc.*, No. 16-40120-705 (Bankr. E.D. Mo. Feb. 9, 2016)).

77. *Id.* at 6.

78. *Id.* at 1.

79. 30 U.S.C. § 1211(g) (2012).

80. *Petition for Rulemaking*, *supra* note 71, at cover letter.

81. *Id.* at 5.

82. *See id.* at 6 (describing this occurrence with Arch Coal and their filings with the U.S. Bankruptcy Court in the Eastern District of Missouri).

83. *Id.*

rule language to its Petition for Rulemaking,⁸⁴ but emphasized that it would like to see OSMRE use a public rulemaking process to determine the final rule language.⁸⁵ The suggested rule mainly focuses on adding provisions that would account for various forms of guarantors that are not currently considered in the rule. Specifically, WildEarth Guardians proposed the addition of a definition for “ultimate parent corporation” at 30 C.F.R. § 800.23(a),⁸⁶ and a provision regarding the need for regulatory authorities to account for the financial status of the ultimate parent corporation(s) of any corporate or non-parent corporate guarantors when assessing total self-bonding, net worth, and bankruptcy status.⁸⁷ More controversially, WildEarth Guardians wants OSMRE to add a paragraph that forbids applicants, including parent corporations, with a history of bankruptcy in the last five years from self-bonding.⁸⁸ If a permitted company files for bankruptcy, WildEarth Guardians wants the rules to trigger a duty upon the permittee to secure an alternate bond or be required to cease mining operations.⁸⁹

2. Comments in Favor of Petitioners’ Proposed Rule

OSMRE sought comments on whether it should consider or deny changes to SMCRA, especially those proposed by WildEarth.⁹⁰ One hundred seventeen thousand (117,000) comments were received.⁹¹ About ninety-nine percent of the comments were in favor of the rulemaking, while less than one percent (thirteen unique comments) were opposed.⁹² Comments in

84. *See id.* at 8–11 (discussing the petitioned-for amendment rule).

85. *Id.* at 8.

86. *Id.*

87. *Id.* at 10–11.

88. *Id.* at 8–9.

89. *Id.* at 11.

90. Notice of Availability of Petition To Initiate Rulemaking and Request for Comments on the Petition, 81 Fed. Reg. 98 (published May 20, 2016) (to be codified at 30 C.F.R. pt. 800).

91. WEG Petition for Rulemaking – Self-Bonding Docket Folder Summary (last updated Sept. 7, 2016), <https://www.regulations.gov/docket?D=OSM-2016-0006>.

92. Decision on Petition for Rulemaking, 81 Fed. Reg. 173, at 61,613 (published Sept. 7, 2016) (to be codified at 30 C.F.R. pt. 800). While OSMRE states that fourteen unique comments were opposed to the rulemaking, it included one neutral comment in that count. This neutral comment was submitted by the Surety & Fidelity Association of America, which is a nonprofit trade association of companies that write most of the nation’s surety and fidelity bonds. This comment essentially explains how a surety operates under SMCRA. *See* Sur. & Fid. Ass’n of Am., Comment on Petition for Rulemaking (July 6, 2016), <https://www>

favor of the proposed rule mainly stemmed from environmental groups; Alliance for Appalachia, Conservation Law Center, Environmental Law and Policy Center, Natural Resources Defense Council, and the national Sierra Club as well as the Illinois Chapter of Sierra Club were among the petitioners' proponents.⁹³ However, many individuals wrote in as well.⁹⁴ Mainly, these comments contained generic language that had been copied and pasted from the environmental groups' websites. The New York University Institute for Policy Integrity wrote in to suggest some of its own policy changes.⁹⁵ Taxpayers for Common Sense, a "nonpartisan budget watchdog" organization located in the District of Columbia, wrote in to support the rule in defense of taxpayers who, they argued, should not have to clean up after the mining industry.⁹⁶ Commenters in favor of the rulemaking all agreed that the federal government should intervene in self-bonding practices.

D. WHAT THE PARTIES OPPOSING THE RULEMAKING WANT

The thirteen unique comments opposing the rulemaking came from mining companies and state governments in states with significant mining activity. The mining and related electric companies were Edison Electric Institute; Luminant Generation Company; Murray Energy Corporation; National Mining Association; Peabody Energy; Tri-State Generation and Transmission Association, Inc.; the Virginia Coal and Energy Alliance; and the

.regulations.gov/document?D=OSM-2016-0006-0042.

93. See All. for Appalachia, Comment on Petition for Rulemaking (July 21, 2016), <https://www.regulations.gov/document?D=OSM-2016-0006-0061>; Conservation Law Ctr., Comment on Petition for Rulemaking (July 11, 2016), <https://www.regulations.gov/document?D=OSM-2016-0006-0044>; Env'tl. Law & Policy Ctr., Comment on Petition for Rulemaking (July 20, 2016), <https://www.regulations.gov/document?D=OSM-2016-0006-0054>; Sierra Club, Comment on Petition for Rulemaking (July 20, 2016), <https://www.regulations.gov/document?D=OSM-2016-0006-0050>; Sierra Club – Ill. Chapter, Comment on Petition for Rulemaking (July 19, 2016), <https://www.regulations.gov/document?D=OSM-2016-0006-0070>.

94. See, e.g., Chloe B., Comment on Petition for Rulemaking (July 19, 2016), <https://www.regulations.gov/document?D=OSM-2016-0006-0069>; Caleb Laieski, Comment on Petition for Rulemaking (June 29, 2016), <https://www.regulations.gov/document?D=OSM-2016-0006-0039>.

95. See NYU School of Law Inst. for Policy Integrity, Comment on Petition for Rulemaking (July 20, 2016), <https://www.regulations.gov/document?D=OSM-2016-0006-0062>.

96. See Taxpayers for Common Sense, Comment on Petition for Rulemaking (July 20, 2016), <https://www.regulations.gov/document?D=OSM-2016-0006-0057>.

Wyoming Mining Association.⁹⁷ The state government groups were the Interstate Mining Compact Commission; the Indiana Department of Natural Resources; the Railroad Commission of Texas; the State of Wyoming (represented by Governor Matthew Mead); and the Wyoming Department of Environmental Quality.⁹⁸ All of these comments voiced the same two main concerns: (1) the proposed rule does not properly account for SMCRA's state primacy/federal oversight scheme, and (2) the proposed rule illegally discriminates against bankrupt companies.

1. State Primacy Is an Integral Part of SMCRA That Cannot Be Ignored

As explained in Part I.A., SMCRA gives states exclusive authority to regulate surface mining once they have an approved program, while OSMRE simply plays the role of overseer with limited supervisory authority.⁹⁹ One of the primary reasons why Congress chose this approach is the wide variation in geological

97. See Edison Elec. Inst., Comment on Petition for Rulemaking (July 15, 2016), <https://www.regulations.gov/document?D=OSM-2016-0006-0046>; Luminant Generation, Comment on Petition for Rulemaking (July 20, 2016), <https://www.regulations.gov/document?D=OSM-2016-0006-0065>; Murray Energy, Comment on Petition for Rulemaking (July 20, 2016), <https://www.regulations.gov/document?D=OSM-2016-0006-0058>; Nat'l Mining Ass'n, Comment on Petition for Rulemaking (July 20, 2016), <https://www.regulations.gov/document?D=OSM-2016-0006-0052>; Peabody Energy, Comment on Petition for Rulemaking (July 20, 2016), <https://www.regulations.gov/document?D=OSM-2016-0006-0059>; Tri-State Generation & Transmission Ass'n, Comment on Petition for Rulemaking (July 20, 2016), <https://www.regulations.gov/document?D=OSM-2016-0006-0060>; Va. Coal & Energy All., Comment on Petition for Rulemaking (July 20, 2016), <https://www.regulations.gov/document?D=OSM-2016-0006-0051>; Wyo. Mining Ass'n, Comment on Petition for Rulemaking (July 20, 2016), <https://www.regulations.gov/document?D=OSM-2016-0006-0047>.

98. See Interstate Mining Compact Comm'n, Comment on Petition for Rulemaking (June 15, 2016), <https://www.regulations.gov/document?D=OSM-2016-0006-0022>; Ind. DNR, Comment on Petition for Rulemaking (June 23, 2016), <https://www.regulations.gov/document?D=OSM-2016-0006-0040>; R.R. Comm'n of Tex., Comment on Petition for Rulemaking (July 8, 2016), <https://www.regulations.gov/document?D=OSM-2016-0006-0043>; State of Wyo., Comment on Petition for Rulemaking (July 20, 2016), <https://www.regulations.gov/document?D=OSM-2016-0006-0068>; Wyo. Dept. of Env'tl. Quality, Comment on Petition for Rulemaking (July 19, 2016), <https://www.regulations.gov/document?D=OSM-2016-0006-0048>.

99. SWEENEY & ARMSTRONG, *supra* note 34, at 2. OSMRE steps in only if a state fails to obtain federal approval to administer its own program or fails to administer its program in accordance with the requirements of the Act.

and ecological conditions under which surface mining is conducted.¹⁰⁰ State agencies inherently have more familiarity with the specific mining problems within their jurisdiction. For example, agencies in the southeast will understand the steep slope mining of the Appalachian Mountains, while agencies in the arid west will be best equipped to deal with relatively level surface mining.¹⁰¹ However, the state-federal governance divide in the statute creates a politically charged atmosphere. SMCRA regulates private coal companies that have survived difficult economic times by merging to create much larger, more powerful companies.¹⁰² These new behemoths are potent political forces at the state and national levels.¹⁰³

These same companies wrote in to complain that WildEarth Guardians “fail[ed] to recognize the benefits of local regulation that SMRCA was founded upon” by its proposal of nationwide fixed standards.¹⁰⁴ One company lamented that the proposed rule changes eliminate any state discretion in the implementation of the bonding requirements, “in contravention of this cooperative approach.”¹⁰⁵ In defense of state expertise, several commenters argued that “[s]tate regulatory programs have over 30 years of front line regulatory experience with coal mine bonding,” putting them “in the best position to determine whether and to what extent adjustments are needed.”¹⁰⁶ Furthermore, the state regulatory authorities are the parties that will be most affected by any OSMRE actions taken with respect to financial assurance requirements.¹⁰⁷ Overwhelmingly, the opposing comments urge OSMRE to reject WildEarth Guardians’ petition, and instead work directly with state regulatory authorities to “understand the dimensions of the issues at stake and work toward the best possible solution for OSMRE, the States, and the public at large.”¹⁰⁸

100. Edgcomb, *supra* note 24, at 312–13.

101. *Id.*

102. DENISE SCHEBERLE, FEDERALISM AND ENVIRONMENTAL POLICY 154 (2004).

103. *Id.* Scheberle uses one of the commenters on the Petition for Rulemaking as an example: “When the National Mining Association speaks, politicians listen.” *Id.*

104. Wyo. Dept. of Env’tl. Quality, *supra* note 98, at 3.

105. Edison Elec. Inst., *supra* note 97, at 5.

106. Ind. DNR, *supra* note 98, at 2; *see also* Interstate Mining Compact Comm’n, *supra* note 98; Nat’l Mining Ass’n, *supra* note 97, at 4 (remarking that states are best poised to evaluate and modify their programs moving forward).

107. Wyo. Dept. of Env’tl. Quality, *supra* note 98, at 1.

108. *Id.* at 2.

On the other hand, environmental groups are nervous to support a cooperative plan between OSMRE and the states because, in the past, SMCRA's deference to states has allowed them to create lax, unenforced programs. In 2007, *Undermined Promise*, the joint report on reclamation created by the National Resources Defense Council, National Wildlife Federation, and Western Organization of Resource Councils, reported that

"in all, [OSMRE] has done less than 3 percent of the number of inspections the states have done each year;" for 2006 to 2013, this percentage remains the same. At 2.75% of the total number of state inspections, the number of federal site visits continues to be low despite increases in the total amount of acreage disturbed by mining in the five states.¹⁰⁹

This may not be a reason for concern, but environmental groups worry that state inspectors are too accommodating to industry, as shown by two surveys conducted in 1995 and 2002 in which responses indicated that state surface mining inspectors were more likely to embrace an accommodative orientation toward coal operators.¹¹⁰ In the same surveys, more than two-thirds of state officials strongly disagreed with the necessity of OSMRE oversight.¹¹¹ The tension between federal and state oversight of mining is palpable in the comments for those opposing the Petition for Rulemaking.¹¹²

2. Discrimination Against Bankrupt Companies Is Illogical and Illegal

Opponents of the Petition for Rulemaking emphasized that, contrary to the image often conjured by the word "bankruptcy," not all bankruptcies result in a company's liquidation. There are six types of bankruptcy under the Bankruptcy Code, usually la-

109. UNDERMINED PROMISE II, *supra* note 26, at 36 (internal citation omitted).

110. SCHEBERLE, *supra* note 102, at 182 (referring to surveys sent to state surface mining officials in twenty-four coal-producing states, along with eighteen phone interviews which complemented the survey data).

111. *Id.* at 185.

112. *See, e.g.,* State of Wyo., *supra* note 98, at 2 ("The OSMRE should allow time for [state] efforts to move forward. To do otherwise threatens the economies and livelihoods of thousands across the nation and in Wyoming.").

belled by the titles of the chapters under which they are categorized.¹¹³ The coal mining companies that have declared bankruptcy did so under Chapter 11,¹¹⁴ which is also known as the “reorganization” chapter.¹¹⁵ This type of bankruptcy is generally “used by commercial enterprises that desire to continue operating a business and repay creditors concurrently through a court-approved plan of reorganization.”¹¹⁶ Importantly, Chapter 11 restructuring does not imply either insolvency or the future failure of a company, as the National Mining Association pointed out in its comment to the Petition for Rulemaking.¹¹⁷ Furthermore, the National Mining Association and other industry commenters argue that just because a company has declared bankruptcy does not mean that it will be unable to provide for the reclamation needs; in fact, reclamation can be worked into the bankruptcy proceedings.¹¹⁸

More significantly, the Bankruptcy Code prohibits discrimination based on bankruptcy status. Under § 525 of the Code, a debtor is expressly protected against discriminatory treatment by a governmental unit based solely on a bankruptcy filing, regardless of whether the bankruptcy filing occurs before or during the case or proceeding.¹¹⁹

The U.S. Supreme Court and other federal courts have routinely held that actions or inactions by governmental agencies that would not have occurred but for the bankruptcy of a debtor or former debtor are prohibited by Section 525(a), and that such prohibition applies regardless

113. See *Process – Bankruptcy Basics*, U.S. COURTS, <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics> (last visited Jan. 31, 2018) (providing an overview and discussion of the six types of bankruptcy cases).

114. See, e.g., OSMRE, Policy Advisory, *supra* note 52, at 2 (noting that in the past few months, three of the largest coal companies have filed for Chapter 11 bankruptcy).

115. *Process – Bankruptcy Basics*, *supra* note 113.

116. *Id.*

117. Nat’l Mining Ass’n, *supra* note 97, at 6–7.

118. *E.g., id.* at 5. The same comment also points out: “Many of the operators cited in WEG’s petition as alleged candidates for ineligibility to self-bond lead the country in reclamation success and routinely win reclamation awards from OSM for outstanding reclamation achievements.” *Id.* at 3.

119. 11 U.S.C. § 525 (2012). The statute specifically says: “[A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act.” *Id.* § 525(a).

of whether the governmental agency's action or inaction was motivated by a desire to enforce its regulatory mandate.¹²⁰

Since this type of illegal discrimination seems to be precisely the solution proposed by petitioners, opponents of the rulemaking used this Bankruptcy Code violation argument as their strongest reason for why OSMRE should not grant WildEarth Guardians' petition. While there are evidently problems with the self-bonding rules as they currently operate, those opposing the rulemaking raised convincing legal arguments based on the language of SMCRA and the U.S. Bankruptcy Code which must be considered in the search for a solution going forward.

III. REDEMPTION IN COAL COUNTRY: THE FUTURE OF SELF-BONDED RECLAMATION

As the rulemaking process makes clear, efforts to hold self-bonded mining companies accountable for reclamation implicate long-standing tensions between environmental groups, taxpayers, and industry, as well as divisions between eastern and western states, and federal and state agencies. One affected group that has not been explored in-depth in this Note deserves mentioning: the communities dependent on mining jobs. These communities, while sympathetic to the industry, also reveal the need to change self-bonding regulations in the future. As discussed in Part I.A., unreclaimed mines are known to create adverse environmental impacts, and mitigation of such damage served as a motivating factor for the initial passage of SMCRA.¹²¹

However, there is more than merely environmental loss if a coal mining company cannot afford to reclaim its land or moves to a new location. People, families, and entire towns dependent on those coal jobs are left behind. Between 2008 and 2012, the national coal industry lost about 50,000 jobs.¹²² Many thousands more have been lost since then, and the numbers continue to decline.¹²³ Particularly in states like Kentucky and West Virginia,

120. *Luminant Generation*, *supra* note 97, at 3 (citing *F.C.C. v. NextWave Pers. Comm'ns Inc.*, 537 U.S. 293 (2003); *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707 (1985); *Perez v. Campbell*, 402 U.S. 637 (1971); *In re Ray*, 355 B.R. 253 (Bankr. D. Or. 2006)).

121. *See supra* Part I.A.

122. Chris Mooney, *Study: Coal Industry Lost Nearly 50,000 Jobs in Just Five Years*, WASH. POST (Apr. 1, 2015), https://www.washingtonpost.com/news/energy-environment/wp/2015/04/01/the-decline-in-coal-jobs-in-one-chart/?utm_term=.7f07e5571da1.

123. *See generally*, ANNUAL COAL REPORT: HIGHLIGHTS FOR 2015, U.S. ENERGY & INFO. ADMIN. (Nov. 3, 2016), <http://www.eia.gov/coal/annual> (providing information on the coal industry in the United States, including the number of

people have been facing the decision to either leave their homes, if they can afford it, or stay and reinvent new careers for themselves.¹²⁴ For the sake of these people, ensuring continuous reclamation is an urgent goal. At the very least, reclamation restores some of the aesthetic beauty of these people's homeland—the loss of which John Prine mourned in *Paradise*. At best, reclamation may be the key to creating new jobs.¹²⁵ Section A discusses changes that should be made at the federal agency level. Section B discusses changes that are already underway and should continue at the state agency level. Section C notes that efforts at the legislative level may serve a backup function, in the event that the rulemaking does not occur or does not adequately address the problems currently presented by self-bonding. Overall, this Part looks to the future of self-bonding and offers recommendations to safeguard reclamation in a way that

mines, employment, and consumption of coal); Andrew Follett, *Obama Kept His Promise, 83,000 Coal Jobs Lost and 400 Mines Shuttered*, DAILY CALLER (Sept. 5, 2016), <http://www.dailycaller.com/2016/09/05/obama-kept-his-promise-83000-coal-jobs-lost-and-400-mines-shuttered> (describing job loss in the coal industry during the Obama Administration); Sheryl Gay Stolberg, *Beyond Coal: Imagining Appalachia's Future*, N.Y. TIMES (Aug. 17, 2016), <https://www.nytimes.com/2016/08/18/us/beyond-coal-imagining-appalachias-future.html> (profiling how towns in Kentucky are trying to recover from the loss of jobs in the coal mining industry).

124. For more information, pictures, and interviews about the impact of the coal industry's decline in Appalachia, see the documentary series produced by AJ+ and published on YouTube. AJ+, *The Unheard Story of Appalachia's Coal, Part 1*, YOUTUBE (Feb. 2, 2017), <https://www.youtube.com/watch?v=1VBYSsEGpLDI>. Part 2 of the series describes how some people were unable to leave Kentucky after the decline of coal jobs because they could not afford it, while at the same time population data shows that (1) about 1100 people have been leaving eastern Kentucky every year since, and (2) the death rate is now higher than the birth rate. AJ+, *How Coal's Decline Devastated Appalachia, Part 2*, YOUTUBE (Feb. 3, 2017), <https://www.youtube.com/watch?v=UJxCqHoUAT8>.

125. For example, a bipartisan bill called the RECLAIM Act was introduced in Congress in 2016 and again in 2017. See Revitalizing the Economy of Coal Communities by Leveraging Local Activities and Investing More (RECLAIM) Act of 2016, H.R. 4456, 114th Cong. (2016); RECLAIM Act of 2017, H.R. 1731, 115th Cong. (2017). It seeks to amend SMCRA to make certain funds available for the Department of Interior to distribute to states that have suffered recent declines in mining jobs. *H.R. 1731 – RECLAIM Act of 2017*, CONGRESS.GOV (Mar. 27, 2017), <https://www.congress.gov/bill/115th-congress/house-bill/1731> (providing a brief summary of the bill and its purposes). Essentially, the bill would put former miners to work reclaiming those same mines. *Id.*; see also *RECLAIM Act: Creating Jobs and Opportunities Out of Abandoned Mines*, APPALACHIAN CITIZENS' LAW CTR., <http://www.powerplusplan.org/reclaim-act> (last visited Jan. 31, 2018).

will appease environmental groups, bring solace to coal communities that have been left behind, and collaborate with mining companies.

A. THE PETITION FOR RULEMAKING SHOULD BE ADDRESSED AT THE FEDERAL AGENCY LEVEL

On September 7, 2016, OSMRE announced its final decision with respect to WildEarth Guardians' Petition for Rulemaking: "The Director has decided to grant the petition, although we do not intend to propose the specific rule changes requested in the petition."¹²⁶ Instead, OSMRE intends to initiate a notice-and-comment rulemaking period to determine the ultimate extent and language of the rule changes. OSMRE admits that "the coal market is dramatically different from when our current self-bonding regulations were drafted" and to "ensure the completion of the reclamation plan as required" under SMCRA, changes need to be made.¹²⁷ The final decision lists several types of changes that may be considered, including revisions to statutory definitions, financial tests, and bonding requirements, as well as the possibility of developing a systematic review process with third-party review to periodically ascertain the true nature of mining companies' financial health.¹²⁸ Some of these changes should be combined with those in the following subsections to produce an effective solution.

1. Consultation with State Agencies

Before any changes are made, OSMRE should consult with state agencies to determine what changes they would prefer. As discussed in Part II.D.1., SMCRA sets up a federalism scheme that places state agencies at the forefront of regulating mine operations.¹²⁹ These agencies wield strong lobbying power, particularly with the new presidential administration.¹³⁰ Most of the

126. Decision on Petition for Rulemaking, *supra* note 92, at 61,612.

127. *Id.* at 61,614.

128. *Id.*

129. *Supra* Part II.B.1.

130. See *Why Coal Mines Close*, W. VALUES PROJECT (June 27, 2016), <http://www.westernvaluesproject.org/wp-content/uploads/2016/06/6-27-16-WVP-Why-Coal-Mines-Close.pdf> ("Over the past decade, [five of the United States' major coal companies] funneled \$100 million to DC lobbyists and politicians to protect the coal industry's \$167 million annual federal taxpayer subsidies."); cf. *For NMA, a New Administration and a New Congress Means a New Beginning*, NAT'L MINING ASS'N (Nov. 9, 2016), <http://www.nma.org/2016/11/09/for-nma-a-new-administration-and-a-new-congress-means-a-new-beginning>; *Statement*

comments opposing WildEarth Guardians' Petition for Rulemaking place emphasis on the deference typically shown to state agency decisions.¹³¹ By consulting with state agencies first, OSMRE will demonstrate a diplomatic willingness to keep political peace and maintain its credibility with the Trump Administration. OSMRE has already begun to take steps in this direction by stating at the end of its Decision on Petition for Rulemaking, "The state [regulatory agencies] have many years of experience with self-bonding and we will ask that they provide specific suggestions on how to improve our regulations to ensure they have adequate financial assurance to complete reclamation of each mine."¹³² Additionally, the Interstate Mining Compact Commission (IMCC), a multistate governmental organization, has been working with OSMRE's Financial Assurance Coordination Team (FACT) since 2015 to address concerns about key elements of reclamation bonds, including self-bonds.¹³³ Following through on its inclination to cooperate, negotiate, and consult with state agencies can only help OSMRE find a suitable outcome.

2. Rejecting Illegal Rule Changes

If OSMRE follows through with a federal rulemaking, comments from the 2016 Petition for Rulemaking should be considered. The most obvious input that should be incorporated comes from opponents who pointed out the illegality of discriminating against bankrupt companies.¹³⁴ Unless Congress amends the U.S. Bankruptcy Code, which is not a proportionate or practical response to this narrow problem in the coal industry, there cannot be a rule which allows OSMRE to "deny, revoke, suspend, or refuse to renew a . . . permit" on the basis of a company's past or

from Peabody Energy on U.S. Presidential Election, PEABODY ENERGY (Nov. 9, 2016), <http://www.peabodyenergy.com/content/120/press-releases> ("With a new Administration comes a new day to find common ground in achieving shared policy goals.").

131. See, e.g., Edison Elec. Inst., *supra* note 97 ("The proposed amendments . . . would deprive states of the discretion to consider self-bonding on a case-by-case basis, consistent with the financial requirements already set forth in the existing regulations."); Tri-State Generation & Transmission Ass'n, *supra* note 97, at 2 ("OSMRE should retain the current rules at 30 CFR Part 800 that provide Regulatory Authorities the latitude to design and implement a regulatory program for their jurisdiction.").

132. Decision on Petition for Rulemaking, *supra* note 92, at 61,615.

133. Gregory E. Conrad, *State Regulatory Perspective re Mine Reclamation Bonding*, paper submitted as part of IEEFA Energy Finance Training conference (Mar. 14, 2017) (on file with author).

134. Decision on Petition for Rulemaking, *supra* note 92, at 61,614.

current bankruptcy status.¹³⁵ Therefore, Petitioners' suggested changes to 30 C.F.R. § 800.23(b) are not lawful.¹³⁶ However, the next Subsection describes a suggested rule change that would be beneficial.

3. Amending Rules To Improve Financial Health Requirements and Review

Petitioners' proposal to broaden and strengthen financial solvency review would legally enable limitations on permitting before bankruptcy is declared. In its Decision on Petition for Rulemaking, OSMRE acknowledges that "the current regulations do not require use of the most appropriate financial tests, both before a self-bond is approved and during the life of a self-bond."¹³⁷ Petitioners' suggest that financial regulations include assessments of companies up the corporate ladder, including ultimate parent corporations, the company at the very top of a particular corporate structure.¹³⁸ They propose this be written into OSMRE's rules as a new definition—ultimate parent corporations—in 30 C.F.R. § 800.23(a). This definition would then be incorporated into any provision that discusses the need for the regulatory authority to assess financial status of companies associated with a self-bond applicant. Such a requirement may have been helpful in the case of Arch Coal, for example, when that ultimate parent company declared bankruptcy, though its subsidiary, Thunder Basin Coal Company, technically still qualified for self-bonding guaranteed by another subsidiary, Arch Western Resources.¹³⁹ Petitioners' proposed expansion of financial review procedures to ultimate parent corporations should be a strong contender for inclusion in the final rule change.

Another way of approaching financial review change is by amending 30 C.F.R. § 800.23(f), or (g), or both. Paragraph (f) allows a regulatory authority to require self-bonded applicants, and parent and non-parent corporate guarantors, to submit an update of the required financial information within ninety days after the end of each fiscal year following the issuance of the self-bond or corporate guarantee.¹⁴⁰ Paragraph (g) requires that, if at any time during the period when a self-bond is posted, the

135. 11 U.S.C. § 525(a) (2012).

136. See *Petition for Rulemaking*, *supra* note 71, at 8–9.

137. Decision on Petition for Rulemaking, *supra* note 92, at 61,613.

138. *Petition for Rulemaking*, *supra* note 71, at 8.

139. *Id.* at 5.

140. 30 C.F.R. § 800.23(f) (2017).

financial conditions of the applicant or parent or non-parent corporate guarantor change so that the financial criteria are not satisfied, the permittee must notify the regulatory authority and, within ninety days, post an alternate form of bond in the same amount as the self-bond.¹⁴¹ The problem, as acknowledged by OSMRE, is that financial conditions of a company can change very quickly, and enforcement of these provisions is difficult.¹⁴² Yearly check-ins on financial health are not enough in this volatile time of slowing coal demand. And if a company forgets or chooses not to comply with the ninety-day-notice rule in paragraph (g), perhaps hoping that the situation will improve soon, a state regulatory authority may not find out about the economic setbacks before the self-bonded entity or its parent company declares bankruptcy. In its decision to grant the Petition for Rulemaking, OSMRE mentioned that it will explore ways in which to “clarify the penalties for an entity’s failure to disclose a change in financial status.”¹⁴³ However, if a company is going bankrupt, it is unlikely that a financial penalty would be effective in motivating disclosure. Instead, OSMRE should amend these provisions to put the burden on the regulatory authority to more frequently check up on the financial status of the self-bonded entity and its associated companies. Paragraph (f) could be amended to increase the frequency with which the regulatory authority must obtain financial updates. Or a new provision could be added about regular financial review, either by the regulatory authority or by an independent third party, to motivate companies to comply with paragraph (g) or risk being discovered and penalized for noncompliance. Increasing the frequency of checkups would help avoid the possibility of a regulatory authority missing changed financial circumstances. Furthermore, it would put the burden on state agencies to modify their regulatory regimes in such a way that maintains the federal-state cooperative power scheme; states would get to control the regulations, but subject to a slightly altered federal mandatory minimum set of rules. These rule changes are recommended because they are workable and strike a compromise. The changes would appease environmental groups and taxpayers concerned with lax financial re-

141. *Id.* § 800.23(g).

142. *See, e.g.*, Decision on Petition for Rulemaking, *supra* note 92, at 61,614 (“In other instances, the financial information came too late or too slowly for [regulatory authorities] to take enforcement action before the company declared bankruptcy.”).

143. *Id.*

view, and ease the tension between federal and state government, while still allowing solvent mining companies to self-bond.

OSMRE itself brought up the possibility of a controversial and important rule change unmentioned by Petitioners but likely to attract opposition from industry—mandatory diversification of financial assurances.¹⁴⁴ OSMRE explained, “Relying on just one type of financial assurance, such as self-bond or a surety bond from just one company, could be risky in an uncertain financial market.”¹⁴⁵ In other words, OSMRE may consider requiring mining companies to provide a variety of reclamation bonds. This is a good idea, because coal companies will be immediately prepared to cover reclamation costs should bankruptcy occur. Mandatory diversification is already a requirement in some states once coal companies can no longer meet financial requirements for self-bonding, and it is the outcome of several recent bankruptcy proceedings.¹⁴⁶ It makes sense for the federal regulations to implement this requirement at the outset, before any bankruptcy declaration. Yet, this proposed change will probably garner controversy, given the prevalence and convenience of self-bonds for mining companies.¹⁴⁷ Mandatory diversification means that companies would have to sacrifice valuable assets or money up front, a risky move during a time when demand for coal is decreasing. This rule change would not eliminate self-bonding completely, but would make the practice less dominant in the industry.

Of course, if a company is no longer allowed to purely self-bond, it will need to put up sufficient collateral to cover all reclamation obligations. OSMRE has admitted that the current regulations allow a small set of assets to be used as collateral for multiple liabilities.¹⁴⁸ This could potentially pose a big problem for companies that may be imminently facing the need to cover each of multiple liabilities. If the total amount of liabilities in the long term exceeds the value of assets used as collateral, reclamation obligations will not be met.¹⁴⁹ OSMRE mentioned that it will consider ways to address this problem, including a requirement

144. *Id.*

145. *Id.*

146. *See infra* notes 154–59 and accompanying text.

147. *See supra* notes 13 and 27.

148. *See* 30 C.F.R. § 800.21 (2017) for the OSMRE regulations governing collateral bonds; *see also* Decision on Petition for Rulemaking, *supra* note 92, at 61,614 (“Under our current regulations, the same small set of assets has been used as collateral for multiple liabilities.”).

149. Decision on Petition for Rulemaking, *supra* note 92, at 61,614.

that “a percentage of all bonds be supported by collateral not subject to any other lien nor used as collateral for any other mine or other liability.”¹⁵⁰ Such a rule change is vital in order to give other rule changes any weight. If OSMRE eliminates or severely limits the practice of self-bonding and mandates diversification of financial assurances, those changes would be meaningless without a provision that requires separate collateral for separate liabilities. This requirement would need to be written into the rules as a new provision, probably in the section regarding collateral bonds.

B. EFFORTS AT THE STATE AGENCY LEVEL SHOULD CONTINUE TO ADDRESS SELF-BONDING

Though states with exclusive authority over their mining programs responded negatively to the Petition for Rulemaking, they are taking steps on their own to address the problem of self-bonding. Greg Conrad, Executive Director of the IMCC, wrote a paper for a presentation on March 14, 2017, at the Institute for Energy Economics and Financial Analysis (IEEFA) in which he stated:

[O]ne of the states’ primary objectives with regard to the recent downturn in the coal industry and concomitant bankruptcy filings has been to insure [sic] that reclamation continues at the affected mines so that their taxpayers are not potentially saddled with the costs of reclaiming active mines Companies that no longer met financial criteria were ordered to replace their self-bonds and, in the interim, were required to continue reclamation operations unabated. To date, reclamation has continued and self-bonds have been replaced or are in the process of being replaced.¹⁵¹

On the reclamation side, Conrad’s statements are supported by Wyoming Department of Environmental Quality (DEQ) data, which appears to show that Arch Coal, Alpha Natural Resources, nor Peabody Coal have yet to interrupt their continuing reclamation efforts (at least in Wyoming), despite recent and ongoing bankruptcy proceedings.¹⁵² For example, 2491.9 acres of Arch Coal’s Black Thunder Mine were released from Phase I reclamation, 2441.3 acres released from Phase II, and 787.1 acres released from Phase III during the months that Arch Coal underwent bankruptcy proceedings.¹⁵³

150. *Id.*

151. Conrad, *supra* note 133, at 9.

152. E-mail from Carol Bilbrough, *supra* note 16.

153. *Id.* To name a few more, Alpha’s Belle Ayr mine released 539.6 acres from Phase I reclamation and 510.4 acres from Phase II while Alpha was still

On the bankruptcy side, there has been a pattern of coal companies emerging from bankruptcy and, at least temporarily, shedding their self-bond liabilities. In July 2016, after long negotiations between the parties in the bankruptcy proceedings, Alpha Natural Resources reached a deal that prohibited future self-bonding.¹⁵⁴ In October 2016, Arch Coal emerged from bankruptcy and promised to replace its \$411 million in self-bonds with traditional insurance to ensure reclamation truly happens at its Wyoming sites.¹⁵⁵ In March 2017, Peabody Coal announced its intention to temporarily replace self-bonding in Indiana, Illinois, New Mexico, and Wyoming with \$1.26 billion in third-party surety bonds, and \$14.5 million from a state bond pool by the time it emerged from bankruptcy in April of 2017.¹⁵⁶ These efforts show that companies have been willing to hold themselves accountable for reclamation even when self-bonds are no longer a viable option. However, reliance on companies to take responsibility is not enough to ensure that reclamation eventually happens, especially once the political spotlight is removed.

Some states have similarly started shifting away from accepting self-bonds over the last few years.¹⁵⁷ Virginia stopped allowing self-bonds on June 30, 2014, when the state's advisory committee recommended no additional self-bonds be accepted.¹⁵⁸

in bankruptcy, and Peabody's Shoshone #1 mine qualified as fully reclaimed. *Id.* For an explanation of the reclamation phases, see *supra* note 16.

154. Benjamin Storrow, *Bankruptcy Court Approves Alpha Natural Resources Bankruptcy Plan, Ends Self-Bonding*, CASPER STAR TRIB. (July 7, 2016), http://www.trib.com/business/energy/bankruptcy-court-approves-alpha-natural-resources-bankruptcy-plan-ends-self/article_9381b194-72bf-5248-b7bf-56f96f1c0ad1.html.

155. Heather Richards, *After Bankruptcy, Arch Coal Will Put Up Cash To Guarantee Mine Cleanup*, CASPER STAR TRIB. (Sept. 13, 2016), http://www.trib.com/business/after-bankruptcy-arch-coal-will-put-up-cash-to-guarantee/article_502daaac-f1b1-5aaa-9315-ee0e196a640e.html.

156. Heather Richards, *Peabody To End Self-Bonds, For Now*, CASPER STAR TRIB. (Mar. 8, 2017), http://www.trib.com/business/energy/peabody-to-end-self-bonds-for-now/article_97b7d420-fd13-559f-ae53-54fa47ab0a0f.html; see also Bryce Gray, *Peabody Emerges from Bankruptcy; Stock Trading Resumes Tuesday*, ST. LOUIS POST-DISPATCH (Apr. 4, 2017), http://www.stltoday.com/business/local/peabody-emerges-from-bankruptcy-stock-trading-resumes-tuesday/article_4c379139-da5c-56a0-8c29-bafadb206ce9.html.

157. *But cf.* Tripp Baltz et al., *No Collateral Needed for Cleanup in Some States Despite Mine Bankruptcies*, BLOOMBERG BNA (Mar. 30, 2017), <https://www.bna.com/no-collateral-needed-n57982085962> (describing how numerous states like Arkansas, Wyoming, and Pennsylvania, are continuing to accept self-bonded permits).

158. *Petition for Rulemaking*, *supra* note 71, at Exhibit 8, Self-Bonding Survey.

Also in 2014, a subsidiary of Luminant Mining was required by the state of Texas to replace \$1.01 billion in self-bonds with cash bonds.¹⁵⁹ As of January 2016, Colorado decided to “mov[e] away from self-bonding.”¹⁶⁰ On November 7, 2017, the State of Wyoming announced the imminent proposal of state regulations to limit self-bonding and strengthen financial review of mining companies that do not qualify to self-bond.¹⁶¹ It is unclear whether this trend is purely a result of states reacting to a changing energy market, or whether public outcry has influenced states’ decisions. Either way, states have properly taken the lead in addressing problems with self-bonding. States must continue to take a strict stance when mining companies can no longer meet the financial requirements of self-bonds, as they have been tasked with regulatory and enforcement authority under SMCRA and therefore owe a duty to their citizens to perform this task.

C. EFFORTS AT THE LEGISLATIVE LEVEL MAY BE USED AS A RECOURSE

This Note has focused on the 2016 Petition for Rulemaking and solutions that could be reached through that process. It is worth pointing out that the federal notice-and-comment rulemaking process can take a long time,¹⁶² especially during a presidential administration that does not want to penalize the coal

159. Storrow, *Concerned About Self-Bonding*, *supra* note 22.

160. Leigh Paterson, *CO “Moves Away” from Self-Bonding*, INSIDE ENERGY (Jan. 5, 2016), <http://www.insideenergy.org/2016/01/05/co-moves-away-from-self-bonding> (quoting Todd Hartman, Communications Director at the Colorado DNR). Colorado managed to get Peabody Energy to provide replacement bonding for twenty-seven million dollars in cleanup costs in April 2016, which led to the Director of OSMRE, Joe Pizarchik, to publicly question whether “collusion” or “malfeasance” was involved in states like Wyoming where self-bonding continued to be accepted. Storrow, *Concerned About Self-Bonding*, *supra* note 22.

161. Heather Richards, *Wyoming Proposes Stronger Rules for Ensuring Clean Up from Coal Operations*, CASPER STAR TRIB. (Nov. 7, 2017), http://www.trib.com/business/energy/wyoming-proposes-stronger-rules-for-ensuring-clean-up-from-coal/article_0dadf9b3-8931-5a8d-8fb5-c06108869c29.html. The draft regulations will be presented to the state’s Land Quality Advisory board on December 6, 2017, and then opened to the public for comment. *Id.*

162. OMB WATCH REGULATORY RESEARCH CTR., BACKGROUND ON THE RULEMAKING PROCESS 3, <https://www.foreffectivegov.org/sites/default/files/regs/rcenter/backgroundpdfs/IV.Rulemaking.pdf> (“The time it takes from initial drafts of a regulation to publication as a final rule can range from a few months to several years. Most often, it takes a few years . . . because of the complexity of the issues, the collection of appropriate information, and the inherent delays built into the regulatory process.”).

industry.¹⁶³ For interested parties like Petitioners, who seek a national change in self-bonding policy, they may want to circumvent OSMRE entirely.¹⁶⁴ This would be a possible route if the federal rulemaking does not happen, or if the rulemaking produces an unsatisfactory result that does not make enough changes to strengthen financial review. Granted, it would be best to wait for a sympathetic Congress before seriously advancing any legislation, and that may take just as long as a federal rulemaking. However, there is already one bill proposed in Congress that could provide the Petitioners' desired result.

The Coal Clean Up Taxpayer Protection Act would address the issue of ensuring reclamation on a national scale without involving OSMRE.¹⁶⁵ Senator Maria Cantwell (D-Wash.), ranking member of the Senate Energy and Natural Resources Committee, spearheaded the Congressional anti-self-bonding campaign throughout 2016.¹⁶⁶ In February 2016, she questioned then-Interior Secretary Sally Jewell about the dangers of self-bonding by coal companies during testimony regarding the Interior Department's budget request for the fiscal year of 2017.¹⁶⁷ In March 2016, Senator Cantwell and Senator Dick Durbin (D-Ill.) submitted a request to the Government Accountability Office to investigate self-bonding by coal companies.¹⁶⁸ Senator Cantwell also followed up on her questioning of Secretary Jewell by sending a letter asking for a plan to protect taxpayers and end self-bonding.¹⁶⁹ In June 2016, Senator Cantwell introduced the Coal

163. See *supra* note 69 and accompanying text.

164. Cf. Baltz et al., *supra* note 157 (quoting a spokesman for the Indiana Department of Natural Resources as saying: "Self-bonding is not a policy. It's law—both state and federal. Any change would have to come from one of those legislative bodies.").

165. S. 3066, 114th Cong. (2016).

166. See *Energy*, MARIA CANTWELL: U.S. SEN. FOR WASH., <https://www.cantwell.senate.gov/issues/energy> (last visited Jan. 31, 2018) (giving a brief description of the Senator's efforts in this area).

167. *Cantwell Questions Secretary Jewell on the Dangers of Self-Bonding by Coal Companies*, U.S. S. COMM. ON ENERGY & NAT. RES. (Feb. 23, 2016), <http://www.energy.senate.gov/public/index.cfm/democratic-news?ID=92D91C29-5E05-40CA-B2D3-6AC6BCE17992>.

168. *Cantwell, Durbin to GAO: Investigate Self-Bonding by Coal Companies*, U.S. SENATE COMMITTEE ON ENERGY & NAT. RES. (Mar. 8, 2016), <http://www.energy.senate.gov/public/index.cfm/democratic-news?ID=F2BA9FD5-A60A-4575-AF22-C5C6E60119FF>.

169. *Cantwell Asks Interior Secretary Jewell for Plan To Protect Taxpayers and End Self-Bonding for Coal Mining Reclamation*, U.S. SENATE COMMITTEE ON ENERGY & NAT. RES. (Mar. 10, 2016), <http://www.energy.senate.gov/public/index.cfm/2016/3/cantwell-asks-interior-secretary-jewell-for-plan-to-protect>

Clean Up Taxpayer Protection Act, which would amend SMCRA to disallow future self-bonding and require current self-bonds to be converted to surety or collateral bonds.¹⁷⁰ When the Act did not pass, the senator reintroduced it in 2017.¹⁷¹ Since Senator Cantwell proposes an even more extreme solution to self-bonding—ending the practice entirely—it is unlikely to acquire bipartisan support in Congress. If someone proposed a bill that included more compromising positions, like those recommended in Parts III.A and B, it may receive more support. This type of legislative campaign is an example of a viable option that not only brings attention and momentum to the issue now, but could serve as an alternative means to the end, in the event that the federal rulemaking never happens or produces an unsatisfactory result.

CONCLUSION

This Note describes how the market trend is shifting away from coal in the long term, causing numerous recent coal mining companies to go bankrupt and making future bankruptcies plausible. Even though coal may never see the same production or consumption levels in the United States again, it cannot be phased out of the national economy immediately or easily. Coal will likely retain a central role in the U.S. energy economy for at least another decade.¹⁷² Therefore, it is necessary to address the problem of self-bonded mine companies before taxpayers are

-taxpayers-and-end-self-bonding-for-coal-mining-reclamation.

170. Coal Cleanup Taxpayer Protection Act, S. 3066, 114th Cong. (2016) (read twice and referred to the Committee on Energy and Natural Resources, June 6, 2016), <https://www.congress.gov/bill/114th-congress/senate-bill/3066>.

171. Coal Cleanup Taxpayer Protection Act, S. 800, 115th Cong. (2017) (read twice and referred to the Committee on Energy and Natural Resources, Mar. 30, 2017), <https://www.congress.gov/bill/115th-congress/senate-bill/800>.

172. Even in states that have committed to phase out coal-fired power plants, the goal date is decades in the future. *See, e.g.*, Mike Hughlett, *State Regulators Approve Xcel's Plan To Shut Down Becker Coal-Fired Plants*, STAR TRIB. (Oct. 13, 2016), <http://www.startribune.com/state-regulators-approve-xcel-s-plan-to-shut-down-becker-coal-fired-plants/397030671> (explaining that the coal-fired generators in Becker, Minnesota, will be shut down by 2026); *Oregon Becomes First State in Nation To Sign Bill That Phases Out Coal, Ramps Up Renewables*, ECOWATCH (Mar. 14, 2016), <http://www.ecowatch.com/oregon-becomes-first-state-in-nation-to-sign-bill-that-phases-out-coal-1882189350.html> (“[The law] will eradicate the use of coal for electricity generation entirely within two decades.”); *TVA Has Agreed To Phase Out Older Coal-Fired Plants by the Year 2020—and Phase in Cleaner, Greener Forms of Energy*, TENN. VALLEY AUTH., <https://www.tva.gov/Environment/Environmental-Stewardship/Air-Quality/Clean-Air-Act-Agreement> (last visited Jan. 31, 2018).

forced to take on the burden of reclamation. This Note argues that the federal agency in charge of coal mining, OSMRE, should change the language of existing regulations to strengthen financial review and require diversification of financial assurances. This Note also encourages OSMRE to work closely with state agencies moving forward, as states have the primary enforcement role under SMCRA and the most experience working with coal mine companies, including on the issue of self-bonding. Whether or not the rulemaking will proceed in the near future remains to be seen. If the rulemaking does not occur or does not correct the problems identified with self-bonding, Petitioners should consider the (admittedly difficult) path towards amending regulations through legislative efforts. For the sake of the land, the local communities, and the taxpayers, self-bonding reclamation practices need to change.